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September 4, 2008

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: June 3, 2008

Case Number: TSO-0636

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."<sup>1</sup> For the reasons set forth below, I conclude that the individual's security clearance should not be restored at this time.

## **I. BACKGROUND**

The individual is employed by a Department of Energy (DOE) contractor, and was granted a security clearance in connection with that employment. During a random drug test administered to the individual on January 31, 2008, he tested positive for marijuana metabolites. Because this information raised security concerns, the individual was summoned for an interview with a personnel security specialist on February 25, 2008. After concluding that this Personnel Security Interview (PSI) did not resolve these concerns, the local security office determined that derogatory information existed that cast into doubt the individual's eligibility for a security clearance. The manager of the local security office informed the individual of this determination in a letter that set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization. The individual requested a hearing on this matter. The local security office forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer. The DOE introduced 28 exhibits into the record of this proceeding. The individual introduced four exhibits into the record and presented the testimony of three witnesses, in addition to testifying himself.

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<sup>1</sup>An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

## **II. THE NOTIFICATION LETTER**

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (k) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (k) pertains to information indicating that the individual has "sold, transferred, possessed, used, or experimented with a . . . substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, . . . etc.)" except as prescribed or administered by a physician or otherwise authorized by federal law. As support for this paragraph, the Letter cites the positive drug test and the individual's alleged admissions during the PSI that he used marijuana between three and five times during December 2007 and January 2008, and on a regular basis from 1975 to 1979.

Pursuant to criterion (l), information is derogatory if it indicates that the individual "has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [her] to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior . . . or violation of any commitment or promise upon which the DOE previously relied to favorably resolve an issue of access authorization eligibility. " 10 C.F.R. § 710.8(l). Under this paragraph, the Letter states that on October 10, 1979, the individual signed a DOE Drug Certification stating that he would not use illegal drugs while holding a security clearance, and that on October 10, 1997, and January 30, 2003, he signed DOE Security Acknowledgments stating that he understood that illegal drug usage while holding a security clearance could result in the loss of that clearance. Nevertheless, he admitted to having used marijuana between three and five times during December 2007 and January 2008. Furthermore, the Letter alleges that, although the individual knew that associating with illegal drug users was prohibited while holding a security clearance, he knowingly associated with such a person.

## **III. REGULATORY STANDARDS**

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (*affirmed* by OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual’s eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

## **IV. FINDINGS OF FACT AND ANALYSIS**

### **A. Derogatory Information and the Associated Security Concerns**

Except as noted, the following information is undisputed. The individual began working for a DOE contractor in August 1978 and was granted a clearance in December of that year. Subsequently, DOE security obtained information indicating marijuana usage by the individual. The individual was summoned for a PSI in October 1979, and during this interview, he admitted smoking marijuana on an average of four times per month beginning in 1975, when the individual was in high school.

The individual has given conflicting accounts as to when this period of regular marijuana usage ended. In a PSI conducted on October 10, 1979, the individual stated that his last usage was on September 29, 1979. DOE Exhibit (Ex.) 22 at 1. During the February 25, 2008, PSI, the individual indicated that he smoked marijuana regularly “from the summer of 1975 up until October 18, 1979.” DOE Ex. 27 at 34. However, at the hearing, the individual testified that he did not use marijuana after he received his security clearance in December 1978. Hearing Transcript (Tr.) at 130.

After the individual admitted his drug usage during the October 10, 1979, PSI, he “was given a strong security lecture” concerning the DOE’s policy concerning illegal drug usage and the possible consequences of such usage, DOE Ex. 22, and he signed the DOE Drug Certification referred to in the Notification Letter. In October 1997 and January 2003, the individual also signed Security Acknowledgments, which stated that any future illegal drug use would put his clearance in jeopardy.

Beginning in 1991, the individual was administered a series of random drug screening tests by his employer. The individual tested negative for illegal drugs on 10 consecutive occasions, until January 31, 2008, when he tested positive for marijuana metabolites. During the February 25, 2008, PSI, the individual admitted that he had smoked marijuana on multiple occasions during the months leading up to the test, with the last usage occurring two days before the test. On each occasion, a woman that he played poker with gave him the marijuana, and he would smoke approximately half of a marijuana cigarette. These circumstances adequately justify the DOE’s invocation of criteria (k) and (l), and they raise significant security concerns. Use of an illegal drug can raise questions about an individual’s reliability and trustworthiness, both because such usage may impair judgement and because it raises questions about a person’s ability or willingness to

comply with laws, rules, and regulations. An unwillingness to comply with security guidelines or to adhere to commitments made to the DOE also raises questions about an individual's reliability and trustworthiness, and casts doubt upon an individual's ability to protect classified information. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines E and H.*

## **B. Mitigating Information**

At the hearing, the individual attempted to address these security concerns by showing, through his testimony and the testimony of his psychologist, his son, and a co-worker, that he used marijuana in December 2007 and January 2008 in order to cope with extreme stress caused by situations involving his mother and his nephew. He also attempted to demonstrate that he is no longer using marijuana and that he has found more appropriate ways of coping with the issues involving his family members.

The individual testified that he used marijuana on a total of "three or four" separate occasions during December 2007 and January 2008. Tr. at 124-125. On each occasion, the individual was playing poker at a local establishment. Between games, he and other players would leave the building, and the individual would smoke approximately one half of a marijuana cigarette that had been given to him by a fellow player. Tr. at 127-128. Although he knew that smoking marijuana was illegal, Tr. at 113, and that he was breaking a promise that he had made to the DOE to not use illegal drugs while holding a security clearance, Tr. at 136, he used the drug anyway in order to escape the stress that he was under at the time, and to alleviate the effects of depression.

He testified about his relationships with his nephew and his mother, which, he said, were the sources of that stress. He indicated that his nephew (the son of his twin brother) came to live with him after the nephew's mother and father separated. Tr. at 138. At first, the individual said, there were no problems. However, after the nephew's brother was diagnosed as being HIV-Positive and the nephew began having relationship problems with the mother of his child, the nephew's mental and emotional condition began to deteriorate. Tr. at 139, 143. The deterioration manifested itself in several forms: the nephew's stealing, his "tearing up" the house, and his threats of violence against the individual and his family. Tr. at 23, 140.

The individual then recounted an incident that occurred during the 2007 Christmas holidays. He said that he was going to play cards at his house, but his poker chips were not where he had placed them two weeks earlier, and could not be located. Suspecting that his nephew had moved them, he told the nephew to retrieve them. The nephew replied that the chips were in the garage. The individual searched the garage unsuccessfully. Later that evening, while the nephew was away, the individual searched the nephew's room for the chips. During this search, the individual found a substantial quantity of what appeared to be ground-up rat poison in the nephew's room. At that time, the individual recalled that approximately a week or two previously, he had become ill on several occasions. He began to suspect that his nephew had poisoned him. The individual threw the suspected poison away. When the nephew returned, he again asked where the chips were, and the nephew replied that he had been playing with them in the garage, but that they had fallen into the individual's wood-burning stove and been destroyed. At

approximately 3:30 the following morning, the nephew went into the kitchen, picked up a 19-inch television off of the individual's kitchen table, and smashed it on the floor. He then punched a hole in the individual's bedroom door in an apparent fit of anger over the individual's earlier search of his room. About a week later, the individual came home to find all of the allegedly-destroyed chips on the kitchen table. Tr. at 140-142.

The individual further testified that the nephew threatened to kill his grandson's cats, stole the individual's truck "a couple of times," and "demolished the whole side of" the vehicle. Tr. at 142-143. After incidents of this nature had been occurring "for a long period of time," the individual had the nephew removed from his house. Tr. at 142. Although he said that this action "tore a part of [his] heart out," he had to do it because the nephew "was mentally destroying [him]." *Id.*

The individual then testified about his mother. He explained that she appears to be in the beginning stages of Alzheimer's Disease, and has become increasingly agitated about what she sees as her impending demise. She can no longer handle her own business affairs, and the individual is the sole member of his family who has assumed any responsibility for her care. Tr. at 143-146.

The individual's son and his co-worker essentially corroborated the individual's testimony. The individual's son added he and his father have had to call the police on numerous occasions in response to the nephew's behavior, that the nephew threatened to kill the six police officers who removed him from the individual's home several months before the hearing, and that the individual's mother has been moved "four or five times" in the past year from one retirement home to another. Tr. at 13, 17, 18, 23, 26. The individual's co-worker testified that she was a geriatric-care professional and that she believed that the individual's mother was suffering from "geriatric depression." Tr. at 48.

The individual's psychologist also testified. He stated that the individual was referred to him through the Employee Assistance Program shortly after he tested positive on January 31, 2008. Tr. at 67. After reviewing the individual's records, interviewing him and administering diagnostic tests, the psychologist diagnosed the individual as suffering from cannabis abuse and clinical depression. Tr. at 70. In response to these diagnoses, the psychologist developed a treatment program for the individual, which included referral to a psychiatrist for evaluation and possible medication and mental health counseling to assist the individual in alleviating stress and developing appropriate coping skills. *Id.*

The psychiatrist to whom the individual was referred, the psychologist continued, prescribed Wellbutrin for the individual's depression and Ambien to help the individual sleep. Tr. at 72, 151-152. The mental health counseling included advising the individual to consider having his nephew removed from the individual's house, information on more appropriate ways of dealing with stress, such as through nutrition and exercise, and an exploration of the dynamics and the behavioral, emotional and physiological consequences of marijuana usage. Tr. at 73, 86, 88.

The psychologist described the individual as being "very compliant" with the treatment program, and described his prognosis as "positive." Tr. at 71. He explained that when he began seeing the individual, the individual was "severely depressed," but that, just before the hearing, the individual scored a "1" on the Beck Depression Inventory, which falls

within the “normal” range. *Id.* The psychologist also opined that the individual’s cannabis abuse was in full remission, and that he was therefore completely rehabilitated from that disorder. Although the individual’s period of abstinence of almost six months fell short of the standard for full remission set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), the psychologist based his departure from the DSM-IV-TR on his clinical experience, and the individual’s negative drug tests since January, 31, 2008. Tr. at 83-84. He concluded that the individual used marijuana in December 2007 and January 2008 in response to the stresses that he was under at that time, and he described the individual’s chances of using marijuana in the future as “very minimal.” Tr. at 87-88.

### **C. Analysis**

After reviewing this testimony and the other evidence in this proceeding, I am convinced that the individual was involved in very stressful situations with his nephew and his mother during a period of time that included December 2007 and January 2008, when he repeatedly used marijuana. The individual’s testimony in this regard was corroborated by that of his son and his coworker. I also found credible the individual’s assertion that this stress contributed to his decision to use marijuana during these months, and I attach significant weight to the psychologist’s conclusion that the individual is in full remission from cannabis abuse and is exhibiting adequate evidence of rehabilitation.

Consequently, as explained in greater detail below, I find that the individual has adequately addressed the DOE’s security concerns under criterion (k). However, because I continue to harbor serious doubts about the individual’s honesty, reliability and willingness to abide by security requirements, I must conclude that valid security concerns remain under criterion (l).

#### **1. Criterion (k)**

Several factors lead me to conclude that the individual has sufficiently mitigated the DOE’s criterion (k) concerns. First, although the individual did use marijuana on a regular basis during the mid-to-late seventies, his usage in recent years has been far more sporadic. The individual claims to have abstained from all marijuana usage from December 1978 until December 2007, Tr. at 131, and that testimony is corroborated as to the period from 1991 until December 2007 by the individual’s 10 consecutive negative drug screens. Individual’s Exhibit 4. He did use marijuana “three or four times” during the December-January time frame, but these usages were, at least in part, a response to the considerable stress that he was experiencing at the time. Since then, negative test results and information submitted by the psychologist indicate that the individual has refrained from further illegal drug usage. *Id.*

Second, the record indicates that the individual has received a significant amount of drug-related counseling from the psychologist during the months since his positive test. That counseling has included information concerning the causes of the individual’s cannabis abuse, and the effects that abuse has had on him. Tr. at 86.

Finally, I have considered the psychologist’s positive prognosis and his belief that the individual is sufficiently rehabilitated from his drug usage disorder. In making their

decisions, Hearing Officers accord deference to the expert opinions of psychiatrists and other mental health professionals regarding rehabilitation and reformation. *See, e.g., Personnel Security Hearing*, Case No. VSO-0146, 26 DOE ¶ 82,788 (1997) (affirmed by OSA, 1997); *Personnel Security Hearing*, Case No. VSO-0027, 25 DOE ¶ 82,764 (1995); *Personnel Security Hearing*, Case No. VSO-0015, 25 DOE ¶ 82,760 (1995). Based on the information before me, I find that the psychologist could reasonably conclude that the individual is currently exhibiting adequate evidence of rehabilitation. The individual has adequately addressed the DOE's security concerns under criterion (k).

## **2. Criterion (l)**

I reach a different conclusion, however, with regard to criterion (l) because I have serious concerns about the individual's honesty, reliability and willingness to abide by security requirements. My concerns about the individual's honesty and reliability are based on statements that the individual made during the hearing that are contradicted by the record in this matter, and on the individual's violation of his Drug Certification, which was a commitment that was relied upon by the DOE in resolving an issue regarding access authorization eligibility in the individual's favor.

At the hearing, the individual testified that his period of regular marijuana usage ended in the latter part of 1978, and that he did not use marijuana after he received his clearance in December 1978 until his "three or four" usages from December 2007 through January 2008. Tr. at 131, 137. However, during the October 10, 1979, PSI, the individual admitted that, from the summer of 1975 up to the time of the interview, he smoked marijuana on an average of four times a month, with his last usage occurring on September 29, 1979. DOE Exhibit 22. During the February 25, 2008, PSI, the individual indicated that he smoked marijuana approximately four times a month until October 18, 1979. February 25, 2008, PSI at 34. I am aware that the differences between the individual's testimony at the hearing and statements that he made during an interview 29 years earlier can potentially be attributed to a faulty memory. However, I am less willing to reach such a conclusion with regard to inconsistencies between the individual's testimony and his statements during the February 2008 PSI, which took place only five months prior to the hearing. Moreover, I find it difficult to believe that, even after 29 years, the individual could forget that, for a period of approximately nine months, he used marijuana regularly while holding a security clearance, a practice that put his clearance, and quite possibly his job, in jeopardy. While I cannot totally discount a faulty memory as a possible explanation for these discrepancies, I believe it to be more likely that the individual knowingly and intentionally made false statements at the hearing.

I harbor similar doubts concerning the individual's reliability. Although the individual signed the DOE Drug Certification on October 10, 1979, approximately 28 years prior to his usages of marijuana in December 2007 and January 2008, he realized at the time of those usages that he was violating a commitment that he had made to the DOE to not use illegal drugs while holding a security clearance. Tr. at 136. The individual was involved in very stressful situations with his nephew and his mother during that period, and I believe that those stresses were a factor in his decisions to use marijuana. However, the individual had alternatives in coping with these issues, alternatives that did not involve violations of the law or of DOE security commitments or requirements. One such

alternative was to seek mental health counseling from the same Employee Assistance Program to which he was referred after his positive drug test. At the hearing, the individual attempted to explain his failure to seek such counseling by alleging that there is a widely-held belief among workers at the individual's facility that if a clearance holder seeks professional help for depression or another mental disorder, "they'll pull your clearance." Tr. at 112. He was therefore "afraid to go ask the doctor for help." Tr. at 111.

I find this explanation to be unsatisfactory for two reasons. First, the individual did not present any evidence in support of the existence of any such belief among his co-workers. Second, there is a striking inconsistency between the individual's refusal to seek professional help, allegedly for fear that it would jeopardize his clearance, and his willingness to use marijuana during the period in question, even though he knew that he was subject to random drug testing, and that a positive test could lead to revocation of that clearance. The individual exercised extremely poor judgement in using marijuana, and his knowing and willful violation of the Drug Certification raises serious doubts as to his reliability and trustworthiness.

The record in this case indicates that the individual was a regular user of marijuana when he received his clearance in December 1978. Despite having been informed at that time that illegal drug usage was inconsistent with holding a DOE clearance, Tr. at 129-130, the individual continued to smoke marijuana regularly for at least nine more months. Upon discovering this usage, the DOE had the individual sign the Drug Certification, and relied upon that document in allowing the individual to keep his clearance. DOE Exhibit 22. If this earlier usage constituted the extent of the individual's illegal activity, I would probably conclude that the DOE's criterion (l) concerns had been mitigated by the passage of time. However, in December 2007 and January 2008, the individual again used marijuana on multiple occasions. This behavior demonstrates a disturbing, and continuing, willingness to violate the law and DOE security commitments and requirements. For these reasons, I conclude that the DOE's security concerns under criterion (l) remain unresolved.

## **V. CONCLUSION**

Based on the factors discussed above, I conclude that the individual has successfully addressed the DOE's security concerns under criterion (k), but that the criterion (l) concerns remain unresolved. The individual has therefore failed to demonstrate that restoring his clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's security clearance should not be restored at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer  
Hearing Officer  
Office of Hearings and Appeals

Date: September 4, 2008